Supreme Court, U.S.
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No. 96-978

In the Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT C. WILSON, PETITIONER

v.

SAMMY DRAKE AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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13 pp

QUESTION PRESENTED

The Federal Employees Liability Reform and Tort Compensation Act of 1988 provides that a tort action brought against a federal government employee for actions taken within the scope of employment "shall be deemed an action against the United States" under the Federal Tort Claims Act, and that "the United States shall be substituted as the party defendant." 28 U.S.C. 2679(d). The question presented is:

Whether the court of appeals correctly held that the individual defendant accused of assaulting petitioner in a work-related dispute acted within the scope of his employment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 87 F.3d 1073. The orders of the district court (Pet. App. 13a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1996. A petition for rehearing was denied on September 16, 1996 (Pet. App. 16a). The petition for a writ of certiorari was filed on December 16, 1996 (a Monday). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694,

102 Stat. 4563, commonly known as the Westfall Act, makes an action against the United States the exclusive damages remedy for injuries resulting from "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. 2679(b)(1). When a federal employee is sued for a wrongful or negligent act, the Attorney General of the United States* may certify that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d)(1). Upon this certification, the action "shall be deemed an action against the United States," *ibid.*, under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, and "the United States shall be substituted as the party defendant," 28 U.S.C. 2679(d)(1). The action then "shall proceed in the same manner as any action against the United States [under the FTCA] and shall be subject to the limitations and exceptions applicable to those actions." 28 U.S.C. 2679(d)(4).

The Attorney General's certification that the defendant was acting within the scope of employment is subject to judicial review. *Gutierrez de Martinez* v. *Lamagno*, 115 S. Ct. 2227 (1995). Whether an employee was acting within the scope of employment is a federal question, *id.* at 2236, but it is determined by reference to the *respondeat superior* law of the State where the acts occurred, see H.R. Rep. No. 700, 100th Cong., 2d Sess. 5-6 (1988).

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* The Attorney General has delegated this authority to the United States Attorneys. 28 C.F.R. 15.3(a).

2. Petitioner Robert C. Wilson, an engineer at the Naval Air Warfare Center in Point Mugu, California, brought a tort action in state court against his immediate supervisor, respondent Sammy J. Drake. Wilson alleges that in June 1992 Drake came to his office to request information concerning Wilson's need for a reasonable accommodation on account of a medical condition, carpal tunnel syndrome. According to Wilson, Drake prevented him from leaving his office for approximately 30 minutes. Pet. App. 4a. Wilson further alleges that, later that day, Drake used physical force to prevent him from recording a conversation. *Id.* at 4a-5a. Alleging "some physical injury and severe emotional distress and mental anguish," *id.* at 5a, Wilson seeks damages for "injury to reputation, battery, [and] violation of personal space," *id.* at 4a.

The Attorney General, acting through the United States Attorney, certified that Drake was acting within the scope of employment during the alleged incidents. The action was removed to federal district court, and the United States, substituting itself as the defendant, Pet. App. 5a, moved to dismiss on the grounds that (a) Wilson had failed to file an administrative claim as required by the FTCA, 28 U.S.C. 2675(a), and (b) Wilson's claims were barred by 28 U.S.C. 2680(h), which exempts from the FTCA "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." Wilson opposed the motion and moved for resubstitution of Drake as the defendant. Pet. App. 5a.

The district court granted Wilson's motion to resubstitute Drake as the defendant. Pet. App. 13a.

The court explained that California cases broadly construing "scope of employment have done so for the purpose of extending rather than limiting liability." *Id.* at 14a. The court reasoned that "the California Supreme Court, confronted with the facts of this case, would carve an exception from the broad construction of course and scope of employment * * * so as not to have the effect of eliminating a party's responsibility for its own intentional acts and leaving the plaintiff with no remedy at all." *Ibid.*

Drake then moved for summary judgment, providing additional information and affidavits concerning the employment-related nature of the alleged incidents. The district court denied the motion. The court acknowledged that the alleged conduct fell within California's definition of scope of employment, but maintained that, "properly educated," the California Supreme Court would hold that intentional tortious acts "can produce liability even to federal employees, [and] even if there is a declaration that those same acts are done within [the] course and scope." Pet. App. 6a.

3. The court of appeals reversed and remanded with instructions to substitute the United States as defendant and to dismiss the action against the United States under the FTCA. Pet. App. 1a-12a. The court concluded that, under established California law, an alleged assault or battery committed by an employee is within the scope of employment "if it results from 'a dispute arising out of the employment.'" *Id.* at 8a (quoting *Carr* v. *Wm. C. Crowell Co.*, 171 P.2d 5, 7 (Cal. 1946)). Because the alleged acts all took place in the office during regular business hours and involved work-related matters, the court found "more than sufficient support * * * [for]

the U.S. Attorney's certification that Drake was acting within his scope of employment." *Id.* at 8a-9a.

The court then rejected the district court's conclusion that, although Drake acted within the scope of employment under California law, a California court would create an exception to established principles of *respondeat superior* liability in order to avoid immunizing Drake for his alleged behavior. Pet. App. 9a. The court found that the district court's rationale conflicted with *United States* v. *Smith*, 499 U.S. 160 (1991), in which this Court held that the Westfall Act immunizes federal employees for conduct within the scope of employment even when an FTCA exception also precludes recovery against the United States. Pet. App. 9a-10a. The court of appeals rejected Wilson's related contention that California courts, without creating an exception to existing *respondeat superior* principles, would nonetheless invoke "policy considerations" to decline to apply that doctrine to completely extinguish a remedy for the wrongs alleged by petitioner. *Id.* at 10a-11a. The court concluded that this argument was precluded by this Court's holding in *Smith*, 499 U.S. at 166, that the Westfall Act requires the substitution of the United States as defendant in tort actions even where this substitution "foreclose[s] a tort plaintiff's recovery altogether."

ARGUMENT

The decision of the court of appeals rejecting petitioner's contentions is correct and does not conflict with the decision of this Court or any other court of appeals. Review by this Court is therefore unwarranted.

1. Under the Westfall Act, the exclusive damages remedy for a tort committed by a federal employee while acting within the scope of his or her employment is a suit against the United States under the Federal Tort Claims Act—even if the FTCA in turn precludes government liability. *United States* v. *Smith*, 499 U.S. 160, 166 (1991). The court of appeals correctly concluded that, under the *respondeat superior* law of California, Drake's alleged conduct occurred within the scope of his employment. An assault or battery committed by an employee that results from "a dispute arising out of the employment" is within the scope of employment even if it violates the employer's direct orders. *Carr* v. *Wm. C. Crowell Co.*, 171 P.2d 5, 7 (Cal. 1946). Indeed, as petitioner concedes (Pet. 8), intentional torts "similar" to the one alleged here "have been held to be within the course and scope of employment." See, *e.g.*, *Carr*, 171 P.2d at 8 (employee of subcontractor who threw hammer at employee of general contractor during work-related dispute); *Fields* v. *Sanders*, 180 P.2d 684, 688-690 (Cal. 1947) (truck driver who struck motorist with wrench in course of dispute over driving incidents); *Ruppe* v. *City of Los Angeles*, 199 P. 496 (Cal. 1921) (city employee who assaulted apartment building manager while attempting to enter building to install electric meters); *Stansell* v. *Safeway Stores*, 113 P.2d 264 (Cal. Dist. Ct. App. 1941) (grocery

store manager who struck customer); *Hiroshima* v. *Pacific Gas & Elec. Co.*, 63 P.2d 340 (Cal. Dist. Ct. App. 1936) (bill collector who struck plaintiff while attempting to collect).

These precedents amply support the court of appeals' conclusion. Drake and Wilson were brought together solely as a result of the employment relationship, and the alleged acts all occurred in the office during regular business hours. By Wilson's own account, both of the alleged incidents occurred while Drake, acting as his supervisor, was attempting to get information from him regarding a work-related disability. Indeed, Wilson acknowledges, see Pet. App. 8a, that the alleged torts "involved work related issues."

2. The court of appeals correctly rejected the district court's holding that California courts would "carve an exception" to California's general *respondeat superior* law to avoid granting immunity to federal officers. Creating such an exception would be inconsistent with California law and impermissible under the Westfall Act and this Court's decision in *Smith*. As the court of appeals recognized (Pet. App. 11a), California courts routinely have held that government employees acted within the scope of their employment even when a California statute immunized the employee and the employer. See, *e.g.*, *Cappuccio, Inc.* v. *Harmon*, 257 Cal. Rptr. 4, 8 (Ct. App. 1989); *Kemmerer* v. *County of Fresno*, 246 Cal. Rptr. 609 (Ct. App. 1988). There is, therefore, no reason to conclude that they would hold otherwise in this case. In any event, California courts are not free to manipulate their *respondeat superior* doctrine to defeat Westfall Act immunity. The absolute immunity provided by the Act reflects Congress's deter-

mination that immunity from personal liability is necessary to enable federal employees to carry out their duties free from the threat of tort lawsuits. See *Smith*, 499 U.S. at 163; H.R. Rep. No. 700, *supra*, at 1-2, 3-4. While the Westfall Act looks to state law to define "scope of employment," it does not grant States the right to create separate rules governing federal employees specifically designed to limit federal immunity, contrary to Congress's intent. Cf. *Wilson* v. *Garcia*, 471 U.S. 261, 269 (1985); *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 161 (1983).

3. Petitioner also errs in asserting (Pet. 11-14) that the California Supreme Court's recent decision in *Lisa M.* v. *Henry Mayo Newhall Memorial Hospital*, 907 P.2d 358 (1995), changed the law of *respondeat superior* to remove Drake's alleged conduct from the scope of his employment. In *Lisa M.*, the California Supreme Court reaffirmed California's rejection of "the traditional rule that an employee's actions are within the scope of employment only if motivated, in whole or part, by a desire to serve the employer's interests," *id.* at 361, and noted that "[n]onsexual assaults that * * * originated in a work-related dispute" are considered within the scope of employment even if they are not committed to further the employer's interest, *id.* at 363. This is precisely the kind of conduct petitioner alleges. The court's conclusion in *Lisa M.* that a hospital employee's sexual assault on a patient was not "generated by or an outgrowth of workplace responsibilities, conditions or events," *id.* at 364, is simply inapplicable to this case. Accordingly, petitioner's contention (Pet. 15) that the court of appeals should have remanded the case for an evidentiary hearing in light of *Lisa M.* is also without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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